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In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH GERNIE AND EDWARD OGULL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 19–29) is reported at 252 F. 2d 664.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958. An application for rehearing was denied on March 12, 1958. The petition for a writ of certiorari was filed on April 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to submit the case against petitioner Gernie to the jury.

2. Whether it was reversible error to permit testimony that when petitioner Gernie was arrested on September 18, 1956, he was found possessed of $100 of the marked funds that a federal agent had given a defendant when he purchased narcotics from him on July 12, 1956.

3. Whether petitioner Ogull's claim of entrapment was properly left to the jury.

4. Whether petitioners were prejudiced by witness Harrell's claim of the privilege against self-incrimination.

5. Whether defendant Buzzeo's statement to agent Wurms that he was interested in a California restaurant which could be employed for gambling was prejudicial to petitioner Ogull.

6. Whether reversible error resulted from the trial judge's instruction to the jury that, if it believed a witness testified falsely as to one thing, it could reject his entire testimony.

STATEMENT

On October 19, 1956, a 7-count indictment was returned in the United States District Court for the Southern District of New York charging that petitioners, together with defendants Philip Buzzeo and Michael Mayer, conspired to violate the federal narcotics laws from April 1, 1956, up to and including the date of the indictment (Count 7; App. 1a, 11a–15a).[1] These same individuals were also charged with the wilful receipt, sale and concealment of heroin as

[1] "App." designates petitioners' appendix in the Court of Appeals, included in the record now before this Court. "R." designates the trial transcript filed herewith.

follows: Ogull and Buzzeo on April 14, 1956 (Count 1; App. 7a); all four on June 4, 1956 (Count 2; App. 8a); Ogull, Gernie and Buzzeo on July 12, 1956 (Count 3; App. 8a–9a); Gernie and Mayer on August 2, 1956 (Count 4;[2] App. 9a), August 6, 1956 (Count 5; App. 10a) and September 18, 1956 (Count 6; App. 10a-11a).

Following a jury trial, petitioners Gernie and Ogull were convicted as charged.[3] Petitioner Ogull was sentenced to 5 years imprisonment on each of Counts 1–3 and 7, to run concurrently (R. 618–619). Petitioner Gernie was sentenced to a total of 10 years imprisonment: 5 years on each of Counts 2 and 3, and 10 years on each of Counts 5, 6, 7, the sentences to run concurrently. He was also fined $5,000 on Count 7 (R. 619). On appeal, the convictions were unanimously affirmed (Pet. App. 19–29).[4]

The pertinent evidence adduced by the government may be summarized as follows:

1. On April 13, 1956, Maxwell Berner, a special employee of the Bureau of Narcotics, introduced federal undercover agent Wurms to petitioner Ogull at King's Diner, 360 Twelfth Avenue, New York City (R. 26–27). Ogull summoned defendant Buzzeo by

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[2] Count 4 was withdrawn at the conclusion of the government's case (R. 327).

[3] On the day set for trial, Buzzeo and Mayer pleaded guilty to each count of the indictment in which they were named. Buzzeo was sentenced to a total of 6 years imprisonment and a $5,000 fine. Mayer was sentenced to 5½ years imprisonment (R. 2–6; 619–620).

[4] Petitioners' application for bail pending appeal to this Court was denied by Mr. Justice Harlan on January 2, 1958.

phone, and he arrived soon thereafter (R. 27–29). Buzzeo had been informed by Ogull that Wurms was desirous of purchasing heroin of 85% purity (R. 29–30). In the course of their conversation, Buzzeo agreed to sell approximately 8 ounces of heroin to Wurms for $2,750 (R. 30–31). Buzzeo being cautious, however, the actual sale did not take place until the following evening (R. 36–39). After this transaction (Count 1), Buzzeo instructed Wurms to contact "Eddie" (Ogull)[5] whenever he wanted more heroin (R. 39).

On April 20, 1956, accompanied by Berner, agent Wurms met petitioner Ogull at McGinnis's Bar, 304 West 40th Street, New York City, and discussed the April 14th purchase with him. Ogull praised the quality of the heroin and advised Wurms that he would encounter no further delays in his purchases (R. 46). A week later, on April 27, 1956, Wurms, again accompanied by Berner,[6] met petitioner Ogull at the Scarlet Patch Bar, 403 East 57th Street, New York City. Wurms engaged in a private conversation with Ogull, during which Ogull sought to sell him cocaine at $1,300 an ounce (R. 47–48). Wurms had never before discussed cocaine with Ogull (R. 48). When Wurms said this was a higher price than mentioned by Buzzeo,[7] Ogull informed him that this

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[5] Wurms identified Ogull as the individual he had been introduced to under the name "Eddie Brandeis" (R. 26–27, 39).

[6] This was the last time Berner participated in any of the arrangements.

[7] Buzzeo had previously told Wurms that he could get him cocaine at $900–$1,100 an ounce (R. 32–33).

was the price he was told to ask and that they had "5 pieces" for sale* (R. 48). No heroin sale was arranged at this meeting (R. 49).

Agent Wurms' attempts to arrange sales through Ogull on May 3, 4, 7, 10 and 11 proved to be unsuccessful because Buzzeo was unavailable. On May 22, Wurms again met Ogull at the Scarlet Patch Bar and was told that Buzzeo could still not be contacted. Ogull refused, however, to introduce the agent to another source of heroin informing him that he would have to wait until Buzzeo returned to the city (R. 52–53). At this meeting, Ogull sought to persuade Wurms to purchase a whole kilo of heroin (about 35 ounces) at the next sale (R. 53–54).

2. On June 1, 1956, Ogull met again with agent Wurms and this time arranged for the agent to see Buzzeo at 5 p. m., the next day, at the Ship Ahoy Bar, 101 West 66th Street, New York City. Ogull was disappointed when Wurms said he could buy only a quarter of a kilo of heroin (about 8 ounces). He thereupon informed the agent that the price had gone up a few hundred (R. 54–55). At his meeting with Buzzeo, Wurms was informed that the price would be $3,000, that the heroin would be of the same quality as before and that it would come from the same source (R. 55–56). The actual sale was arranged for June 4 (R. 56–58). On that day, at 9:30 p. m., Wurms met Buzzeo at the Ship Ahoy. From there, they drove in Buzzeo's car to 76th Street and Broadway and parked across the street from the Devonshire

*In the parlance of the narcotics traffic, "piece" means an ounce (R. 48).

Garage (R. 58–60). At this point, Wurms gave Buzzeo $3,000 in marked funds (R. 60). Buzzeo then left the car, crossed the street and entered the Lighthouse Cafe at 76th Street and Broadway. Immediately after entering he made a phone call (R. 162, 209). About five minutes later, petitioner Gernie entered the Cafe and joined Buzzeo at the bar. Following a brief conversation, Gernie made a telephone call. Both men then went down to the basement. Upon their return a few minutes later, Gernie stationed himself at a window facing 76th Street and the corner of Broadway (R. 162–164, 210). A little after 10:00 p. m., defendant Mayer drove past the Lighthouse Cafe in a 1955 Oldsmobile[*] and parked in front of the Devonshire Garage (R. 61, 210). Thereupon, Gernie abruptly left his observation post, spoke to Buzzeo, and walked to the office of the Devonshire Garage where he joined Mayer. A few minutes later, Mayer drove off in the Oldsmobile and Gernie returned to the Cafe. He picked up Buzzeo and returned to the garage (R. 61–63, 164–166, 211, 314–315). A moment later, Buzzeo left the garage and under Gernie's surveillance returned to the car where he had left agent Wurms and announced, "I have the stuff" (R. 62–63, 166). Still watched by Gernie (R. 166), agent Wurms and Buzzeo drove off. Shortly thereafter, Buzzeo turned over to Wurms a package containing over 8 ounces of heroin (R. 63, 67; count 2).

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[*] The registration for the car was later found in petitioner Gernie's possession. It was apparently owned by a relative, but was usually driven by Gernie (R. 181–182).

On June 12, 1956, Wurms met with Ogull at Charlie's Diner, 394 Twelfth Avenue, and complained as to the quantity, quality and price of the heroin obtained on "the last deal" (R. 67–68). Ogull then called Buzzeo to join them. After repeating his complaints to Buzzeo, Wurms was informed that the price on the next sale would be cut by $200 and that he would still have to operate through Ogull, who gave Wurms his home number (R. 69–72, 429).

3. On July 11, agent Wurms arranged through Ogull another meeting with Buzzeo (R. 72–75). At about 9 p. m. on the next day, Wurms met with Buzzeo at the Dolphin Cafe, 1975 Broadway (R. 74–75). About 10:30 p. m., they drove to the vicinity of the Devonshire Garage (R. 76, 167). Wurms handed over $2,800 in marked funds, and Buzzeo left the car and entered the Lighthouse Cafe (R. 78–79, 167.) At about 10:50 p. m., Gernie drove up to the Devonshire Garage in the same 1955 Oldsmobile that Mayer had driven on June 4th (R. 79, 167). Gernie parked the car in the garage, walked up to the Lighthouse Cafe, shook hands with Buzzeo who came out to meet him, and entered the Cafe (R. 79–80, 167–168, 318–319). After remaining inside for a few minutes, both men walked to the garage. Buzzeo entered Gernie's car, sat in it for a moment, conversed with Gernie, and then rejoined Wurms (R. 80, 168–169. In the car he removed from under his sport shirt a package which he gave to Wurms (R. 81). This package

contained over 8 ounces of heroin (R. 81–87; Count 3).[10]

4. On August 2, 1956, two men later identified as Harell and Jackson parked near the West End Garage at Columbus Avenue and Central Park West, New York City. Harell entered the garage, remained inside a few minutes and then returned to his car. Immediately thereafter, Mayer walked out of the garage, entered his car (a 1952 Pontiac) and drove away. Federal agents followed Mayer to 307 West 69th Street and saw him enter the premises. About 10 minutes later, Mayer came out accompanied by Gernie. Mayer then entered his car and drove to the 67th Street Garage, where he met with Harell for a few moments (R. 204–208; see also testimony of Agent O'Connor, R. 212–214).

On August 6, at about 9:45 p. m., Gernie drove to the vicinity of the West Side Garage, walked over to Mayer's Pontiac parked nearby, opened the door and threw a dark package inside (R. 152, 159, 215, 322). He then entered the garage. Immediately thereafter, Mayer left the garage, entered his Pontiac, and drove to the premises of 307 West 69th Street (R. 215). Gernie was then joined in the garage by Harell. Two or three minutes later, Harell left the garage and drove off. His car was followed by federal agents and stopped at 102nd Street and East River Drive. He was placed under arrest and

[10] When Gernie was arrested on September 18, 1956, $100 of the marked funds given by Wurms to Buzzeo on this occasion was found in his possession (R. 169–171, 178).

was found to possess over 3 ounces of heroin (R. 154, 157–158, 216–217; Count 5).

5. On September 18, 1956, Mayer was arrested at his apartment at 307 West 69th Street. On his person was found a package containing an ounce and a half of heroin, and in his apartment about 56 ounces of heroin. In addition, there was found a Speed stapling machine and assorted paraphernalia for the weighing, packaging and cutting of narcotics (R. 224–251, 495–496; Count 6). The stapling machine was shown to be the same one which pressed the staples used to seal (1) the package containing the heroin purchased by Wurms on July 12, 1956, and (2) the package containing the two ounces of heroin seized from Harrell on August 6, 1956 (R. 278–291).

At the trial Mayer, who was called by the defense, testified that he became involved in the narcotics traffic and obtained the narcotics and packaging paraphernalia from a man named "Harry" (R. 468–469, 472–473). He said he did not remember Harry's last name or the name or address of the bar in which he had met him (R. 471, 491). He denied that petitioner Gernie was implicated in the narcotics transactions, or that he had so stated following his arrest (R. 487–488, 491, 497–498, 501, 503). In rebuttal, on the issue of Mayer's credibility, agent Pera testified that, following Mayer's arrest, Mayer had stated that Gernie had given him the narcotics found in his apartment and that he worked for Gernie in the narcotics operation (R. 517–521). The trial judge limited this rebuttal testimony to the question of Mayer's credibility (R. 544–547; 589–590).

ARGUMENT

1. Petitioner's Gernie's assertion that it was prejudicial error to submit his case to the jury because the evidence against him indicated nothing more than "innocuous activities" is baseless. The evidence developed at the trial reveals, *inter alia*, that, just before the consummation of each of the sales on June 4 (Count 2) and July 12 (Count 3), Gernie was observed by federal officers to come upon the scene, join Buzzeo in private conversation (in the Lighthouse Cafe and Devonshire Garage), and thereafter carefully observe Buzzeo return to agent Wurms possessed of narcotics (*supra*, pp. 6, 7). When Gernie was arrested on September 18, 1956, he was found possessed of a portion of the marked funds ($100) which agent Wurms had given Buzzeo for the narcotics on July 12.[11] Moreover, on August 2, 1956, Gernie was seen with Mayer at the latter's residence, shortly after Mayer's meeting with Harell and Jackson. On August 6, 1956, Gernie was seen throwing a dark package into Mayer's car before continuing on to a meeting with Harell at the West Side Garage. Harell was followed immediately after such meeting and found to be illegally possessed of narcotics (Count 5; *supra*, pp. 8-9).

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[11] The claim is made that it was reversible error to admit testimony concerning petitioner Gernie's possession of the marked funds because such possession (on September 18, 1956) was so remote from the date of the illegal transaction in which it was used (July 12, 1956) as to preclude its admissibility. But possession of the fruits of the crime less than two months after the crime was committed certainly was a fact admissible against Gernie. 1 Wigmore, *Evidence*, §§ 152-154 (3d ed. 1940). Cf. *Wilson* v. *United States*, 162 U. S. 613, 619. The effect of the time interval on the probative force of the evidence

It is thus readily apparent that the case against petitioner Gernie was properly submitted to the jury and, as pointed out by the court below, "was quite ample to sustain his conviction" (Pet. App. 24).

2. Petitioner Ogull contends that the trial court erred in submitting to the jury the issue of whether he was entrapped. Ogull's defense at the trial was based on the vague contention that he became involved in the narcotics transaction in April 1956 as "a favor" to his friend, special narcotics employee Maxwell Berner, because Berner indicated that he had some one in mind who might be able to aid Ogull in real estate transactions (R. 358–362, 384–386, 442–444). He admittedly continued as a contact between Wurms and Buzzeo through the 12th of July, even though he got no closer to the alleged real estate deal (R. 375, 448).[12] The testimony shows that, far from being an innocent victim enticed against his will into the narcotics traffic, Ogull was a ready and willing participant, and an aggressive promoter of the illegal enterprise. For example, Wurms testified that, following

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was for the jury. *Boehm* v. *United States*, 271 Fed. 454, 457 (C. A. 2); *United States* v. *Di Carlo*, 64 F. 2d 15, 17 (C. A. 2). The cases relied upon by petitioner are inapposite. In *Williams* v. *United States*, 168 U. S. 382, there was no connection between the sums deposited in defendant's bank account and the sum extorted in his official capacity. And in *Sun B. Lee* v. *United States*, 245 F. 2d 322 (C. A. 9), the court held inadmissible only that testimony showing defendant's possession of funds more than two years before the crime charge was committed. At the same time, it held admissible evidence that defendant had possession of marked bills used in the illegal narcotics sale (offense charged) immediately after such sale.

[12] Agent Wurms testified that his contact with Ogull continued through August 10, 1956 (R. 511–514).

the April 14th sale (Count 1), Ogull extolled the quality of the heroin Wurms had purchased and told him that there would be no further delays in delivery (R. 46); that, on April 27, Ogull sought to persuade him to buy "five pieces" of cocaine from Buzzeo (R. 47–48); and that Ogull thereafter sought to influence him to increase his purchases to a kilo of heroin (35 ounces) and was disappointed when Wurms decided to purchase less (R. 53–54). On this evidence, Ogull was entitled to no more than that the jury pass upon his claim of entrapment. *Sorrells* v. *United States*, 287 U. S. 435, 451; *Sherman* v. *United States*, 241 F. 2d 329, 333 (C. A. 9), certiorari denied, 354 U. S. 911.[13]

In this same connection, petitioners also argue that the government's failure to produce special employee Berner at the trial or to account for his whereabouts, coupled with the court's curtailment of cross-examination of agent Wurms regarding Berner, limited their opportunity to establish entrapment and was in direct contravention of this Court's ruling in *Roviaro* v. *United States*, 353 U. S. 53.

On February 4, 1956, before the jury was selected, the United States Attorney advised the trial judge that, so far as he knew, Berner was unavailable, that the government could not produce him and that it did not intend to use him as a witness (R. 9). During the trial, government counsel again pointed out that there was nothing to indicate that the govern-

[13] For this reason, the case does not present the issues now before this Court in *Masciale* v. *United States*, No. 84, and *Sherman* v. *United States*, No. 87.

ment had information of Berner's whereabouts (R. 103–104). Although petitioner Ogull's counsel made much of the fact that Berner was not produced by the government, he told agent Wurms, on cross-examination, "I don't want to know his address" (R. 101), and, as observed by the court below, "pursued a half-hearted cross-examination of Wurms on matters touching on Berner's whereabouts" (Pet. App. 28). Primarily, he asked numerous irrelevant and remote questions about Berner, questions properly excluded by the trial judge.[14]

The truth of the matter is that Berner was a minor figure in the negotiations with Ogull. His task was completed when he brought Wurms and Ogull together. Certainly, he cannot be compared to the nameless informer in *Roviaro* v. *United States*, 353 U. S. 53, 64, who "was the sole participant, other than the accused, in the transaction charged." On the contrary, Berner did not participate in Wurms' numerous conversations with Ogull and Buzzeo concerning narcotics,[15] and he completely dropped out of the picture as early as April 27. As petitioner Ogull and his counsel well knew, it was with agent Wurms that Ogull dealt in arranging the numerous meetings with Buzzeo, and it was Wurms' testimony that was significant in this case.

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[14] For example, whether Wurms knew how Berner came to go into the hat business (R. 92) and how many convictions Berner had (R. 93). See, also, R. 102.

[15] Except that it appears that Berner was present when Wurms conversed with Buzzeo on April 13 (R. 120) and when Wurms had a conversation with Ogull on April 20 (R. 46).

3. Benjamin Harell, to whom Gernie and Mayer had allegedly sold narcotics on August 6, 1956, was called as a witness by the government (R. 295). When asked where he had obtained the heroin found in his possession on that date, he invoked the privilege against self-incrimination, and his refusal to testify was sustained by the trial judge (R. 297–312). Petitioners argue that the government had reason to believe that Harell would invoke the privilege and that such action on his part seriously prejudiced petitioners in the eyes of the jury. As the government informed the trial judge, it had no reason to believe that Harell would claim the privilege[18] (R. 301–302, 539–542). And clearly, since he possessed narcotics immediately following his meeting with petitioner Gernie on August 6, 1956, there was every reason to believe that Harell's testimony would be highly relevant. Under these circumstances, the government acted properly in calling him as a witness. *United States* v. *Romero*, 249 F. 2d 371, 374–375 (C. A. 2); *United States* v. *Cioffi*, 242 F. 2d 473, 477 (C. A. 2), certiorari denied, 353 U. S. 975.

In any event, the jury was carefully instructed not to consider Harell's claim of privilege "as constituting evidence in this case against either defendant" (R. 586–587). And, absent a contrary showing, we must assume that the jury followed the instruction.

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[18] It was believed that since Harell had been convicted and sentenced for the very crime upon which he was called to testify he could not properly invoke the privilege (R. 301–302). The Court of Appeals agreed, stating that "the [trial] judge erred in sustaining the witness' claim of privilege" (Pet. App. 29).

Delli Paoli v. *United States*, 352 U. S. 232, 242–243; *Opper* v. *United States*, 348 U. S. 84, 94–95.

4. Petitioners make additional arguments characterized by the Second Circuit "as too insubstantial to require comment" (Pet. App. 29).

a. Agent Wurms testified that during a conversation on August 10, 1956, between himself, Buzzeo and Ogull, Buzzeo mentioned that a friend of his in California wanted to sell a restaurant which might carry gambling games in the back (R. 513). Ogull had previously testified that he had discussed a California real estate transaction with Berner (R. 360–361). Petitioners assert that it was prejudicial error to deny Ogull's motion for mistrial following Wurms' testimony, arguing that the jury was left with the belief that Ogull planned to operate a gambling house in violation of California law. This contention is frivolous. Wurms' testimony referred to Buzzeo, not Ogull. There was no implication that Ogull was involved in violations or proposed violations of California gambling laws.

b. The trial judge instructed the jury (R. 589):

> What do you do with witnesses if you find they told wilful falsehoods? The law says that you can either reject everything on the ground that all of the testimony is tainted by that falsehood or that you can accept that which is credible and reject that which is incredible. That is what the law says you can do with respect to witnesses who you believe told a wilful falsehood.

Petitioners contend that this charge was erroneous in that it omitted the necessary qualification that the

falsehood had to relate to material facts before the jury might reject a witness' entire testimony. As Professor Wigmore has said (3 Wigmore, *Evidence,* § 1014, p. 683 (3d ed. 1940)): "In the nature of character, a person who would lie upon a collateral point is perhaps likely to be a more determined liar than one who dares it only upon a material point; at any rate, there is no less call to distrust the former than the latter". See *United States* v. *Rutkin,* 189 F. 2d 431, 439 (C. A. 3), affirmed, 343 U. S. 130. Moreover, since no exception was taken to this instruction, it was not properly assignable as error. Rule 30, Federal Rules of Criminal Procedure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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